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FEDERAL TRADE COMMISSION

No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1940

PELLANBY CRYSTALS, INC., (FORMERLY
MILKSBY QUARTZ GUILD, INC.), ET AL.,
PETITIONERS

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 251

MILLINERY CREATORS' GUILD, INC. (FORMERLY MILLINERY QUALITY GUILD, INC.), ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We believe the decision below to be correct and we will so urge on the merits if the petition for a writ of certiorari should be granted. However, it is in substantial conflict with *Wm. Filene's Sons Co. v. Fashion Originators' Guild*, 90 F. (2d) 556 (C. C. A. 1st). The conflict in reasoning between the circuits is made still plainer by the decision of the Circuit Court of Appeals for the Second Circuit in *Fashion Originators Guild of America, Inc. v. Federal Trade Commission*, not yet reported, decided July 22, 1940. In that case the court said, of the *Filene's Sons* decision:

We cannot find any distinction between the facts as there found and those which we feel

bound here to take as though proved; and it follows from what we have already said that we are unwillingly forced to a different conclusion. That difference lies in the fact that, as we have said, we do not understand that a court will inquire into whether a combination benefits an industry when the means used are themselves unlawful; and that to try altogether to exclude others from manufacturing what they are free to make, is an unlawful means. If on the other hand the First Circuit believed that the "originator" of a design has an interest to protect greater than one who has merely appropriated an existing design at his own labor and expense, we cannot agree as to that either.

We therefore do not feel justified in opposing this petition for a writ of certiorari.

Respectfully submitted,

NEWMAN A. TOWNSEND,
Acting Solicitor General.

✓ RICHARD P. WHITELEY,
Acting Chief Counsel,
Federal Trade Commission.

AUGUST 1940.

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